IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1387

In re the Marriage of
JAMES E. FITHIAN, JR.,

Petitioner,

and

CAMILLE J. FITHIAN,

Respondent.

BRIEF FOR RESPONDENT
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court, State of California is reported in at 10 Cal. 3d 592; 11 Cal. Rptr. 369.

JURISDICTION

The opinion of the California Supreme Court was made and entered on January 3, 1974. Petitioner James E. Fithian, Jr. filed his Petition for Certiorari within ninety (90) days of that date. Petitioner seeks to invoke the jurisdiction of this court under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether California's treatment of military retirement pay as a community asset conflicts with the federal statutes under which petitioner was retired.

STATEMENT OF THE CASE

The marriage of appellant and respondent was dissolved and an adjudication of the community property of the marriage made by the trial court. One of the assets of the community divided by the Court was the retirement pay attributable to appellant's service in the United States Marine Corps. Appellant was found to have served a total of 22 plus years and to have been married to respondent for 71% of his total active duty years. He had retired in 1969, two years before the filing of a petition for dissolution.

The trial court held, and the Fourth District Court of Appeal, along with the California Supreme Court affirmed that 71% of the retirement pay was community property and awarded 35-1/2% or one-half, of said pay to respondent wife.

ARGUMENT

I
CERTIORARI SHOULD NOT BE GRANTED WHERE NO FEDERAL QUESTION OF SUBSTANCE HAS BEEN DECIDED BY THE STATE COURT.

Rule 19 of the Supreme Court Rules sets forth criteria which must be met before certiorari is granted.

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of

substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decision of this court."

As more fully set forth below, the California Supreme Court after studying applicable Senate reports, Congressional hearings, and the statutes cited by appellant decided that California's treatment of military retirement pay as an asset of community property does not conflict with the federal statutes under which petitioner was retired. Respondent submits that where applicable federal statutes are silent with regards to state characterization of military retirement pay as community, and both state and federal statutes can exist harmoniously, no federal question of substance is presented.

"We have studied Senate reports and Congressional hearings concerned with the adoption of the federal military retirement pay system in an effort to ascertain any legislative intent to preserve the benefits of the system as the separate property of the recipient. We fail to find in the legislative background any indication that Congress intended military retirement pay to be separate property, or conversely, that treating the pay as community property circumvents the Congressional scheme."

Fithian and Fithian,
10 Cal. 3d 592, 111 Cal. Rptr. 369.

II

IN THE ABSENCE OF A CLEAR CONFLICT BETWEEN CALIFORNIA'S TREATMENT OF MILITARY RETIREMENT PAY AS COMMUNITY PROPERTY AND THE PROVISIONS OF TITLE 10 U.S.C., NO FEDERAL QUESTION IS PRESENTED AND CERTIORARI SHOULD BE DENIED.

Where Congress has enacted legislation within its Constitutional authority the courts will try to interpret such legislation in consonance with state law and avoid superseding or overcoming the effects of state law.

Having "due regard for a proper adjustment of the local and national interests in our federal scheme . . . the courts should discountenance 'inroads by implication' on state authority."

Hartford Electric Light Co. v. Federal Power Commission,
131 F. 2d 953 (2d Cir. 1942);

Palmer v. Massachusetts,
308 U.S. 79, 60 S. Ct. 34 (1939);

Federal Trade Commission v. Bunte Brothers, Inc., 312 U.S. 349, 61 S.Ct. 349 (1940).

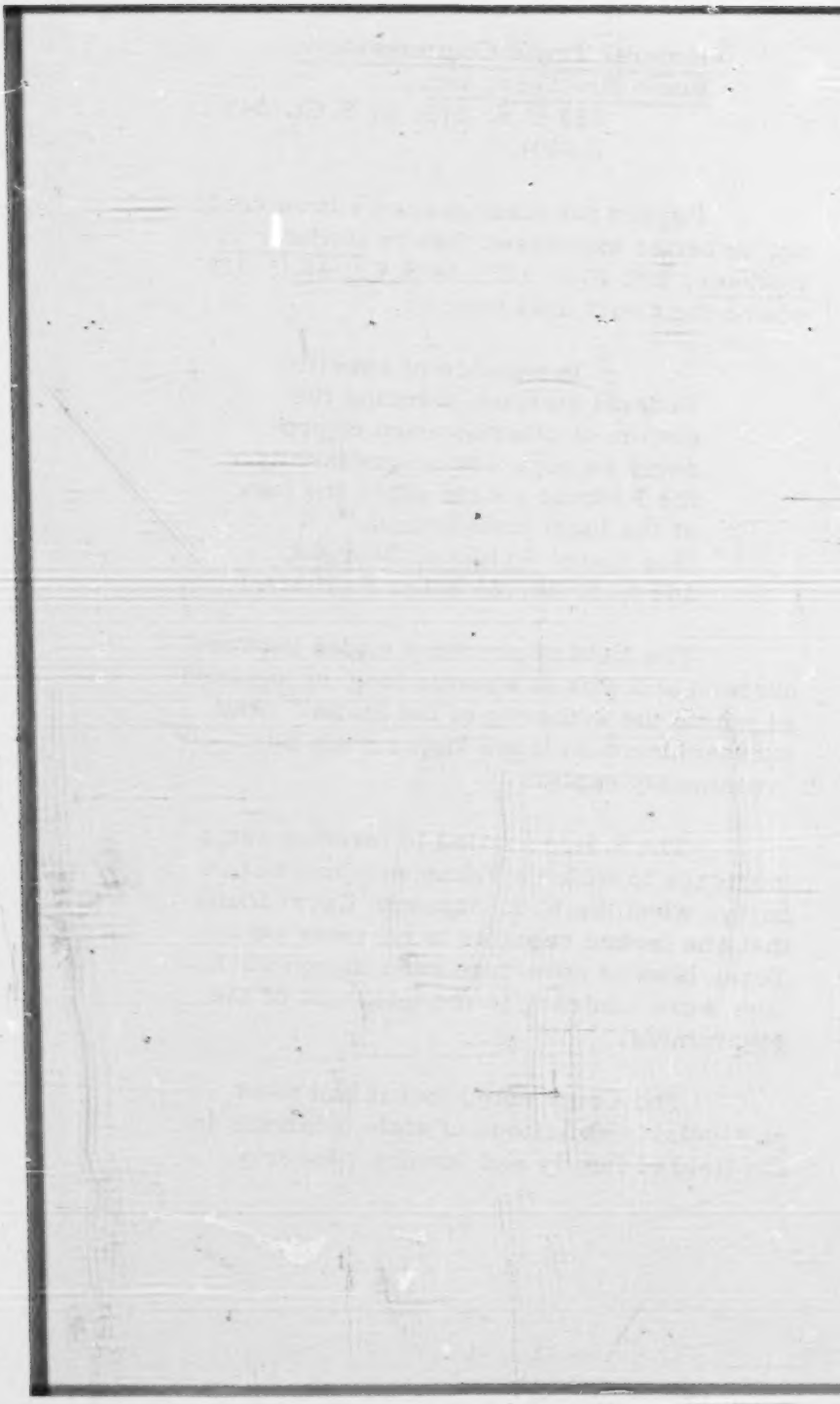
Regard for state property laws could not be better expressed than in Buchser v. Buchser, 231 U.S. 157, 34 S.Ct. 46 (1913) where the Court held that:

> "In absence of specific Federal statutes covering the matter of classification of property as separate or community, the Federal courts apply the laws of the local jurisdiction."
> (See also: Wright v. Morgan, 191 U.S. 55, 24 S.Ct. 6 (1903).)

The field of property rights between husband and wife is an area long recognized as within the authority of the State. Any encroachment on those rights must be "reasonably explicit."

The S.B.A. failed to foreclose on a mortgage to which a Texas wife had been a party, when the U.S. Supreme Court found that she lacked capacity to contract under Texas laws of coverture even though such laws were contrary to the interests of the government.

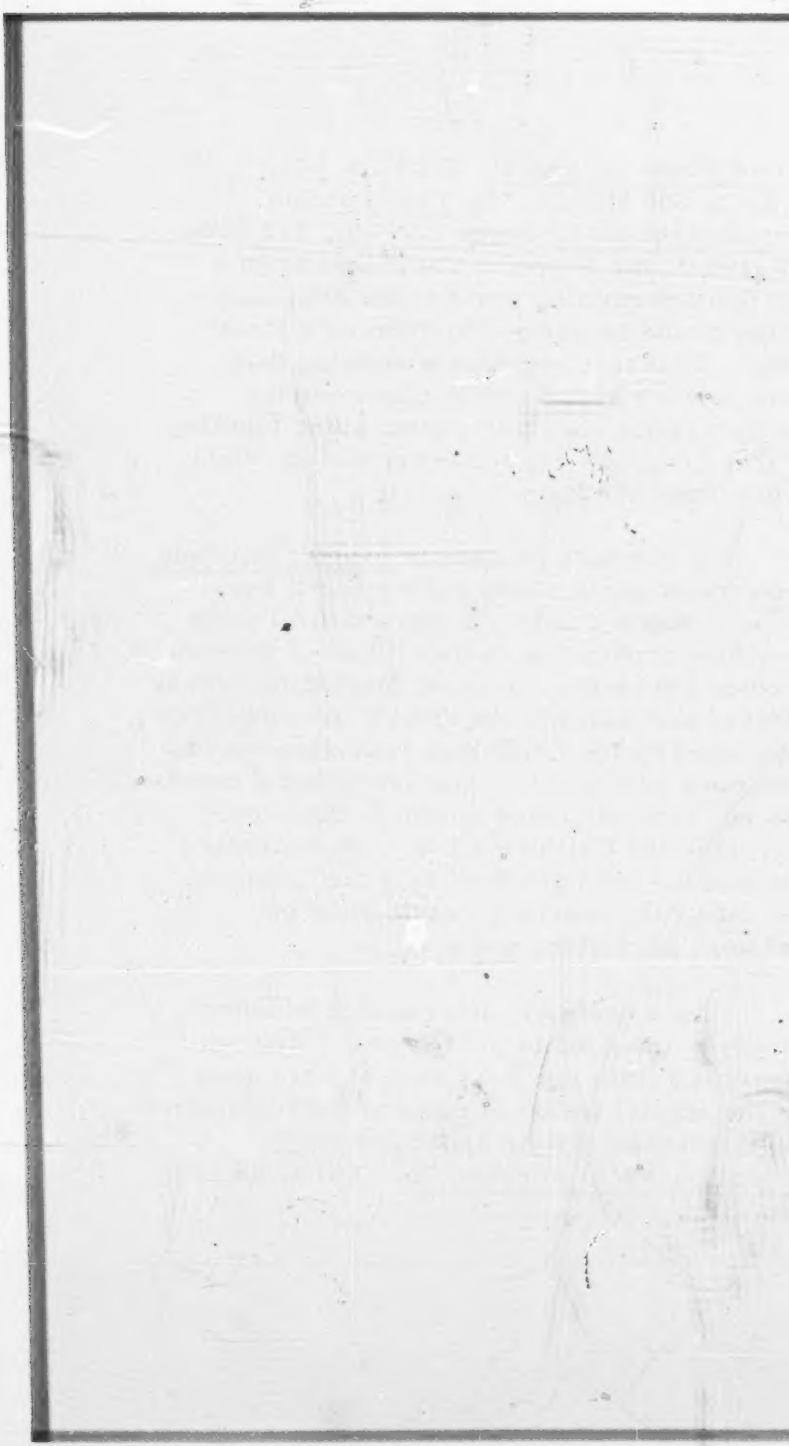
The Court noted that it had been particularly solicitous of state interests in the field of family and familiy property.



United States v. Yazell, 382 U.S. 341, 86 S.Ct. 500 (1956). In Yazell and in Florida Avocado Growers v. Paul, 373 U.S. 132 (1963), the Supreme Court laid down a test for determining whether the supremacy clause would be applied to overcome state laws. That test requires a showing that there is such actual conflict between the two provisions that both cannot stand together or that Congress explicitly showed an intent to pre-empt the field.

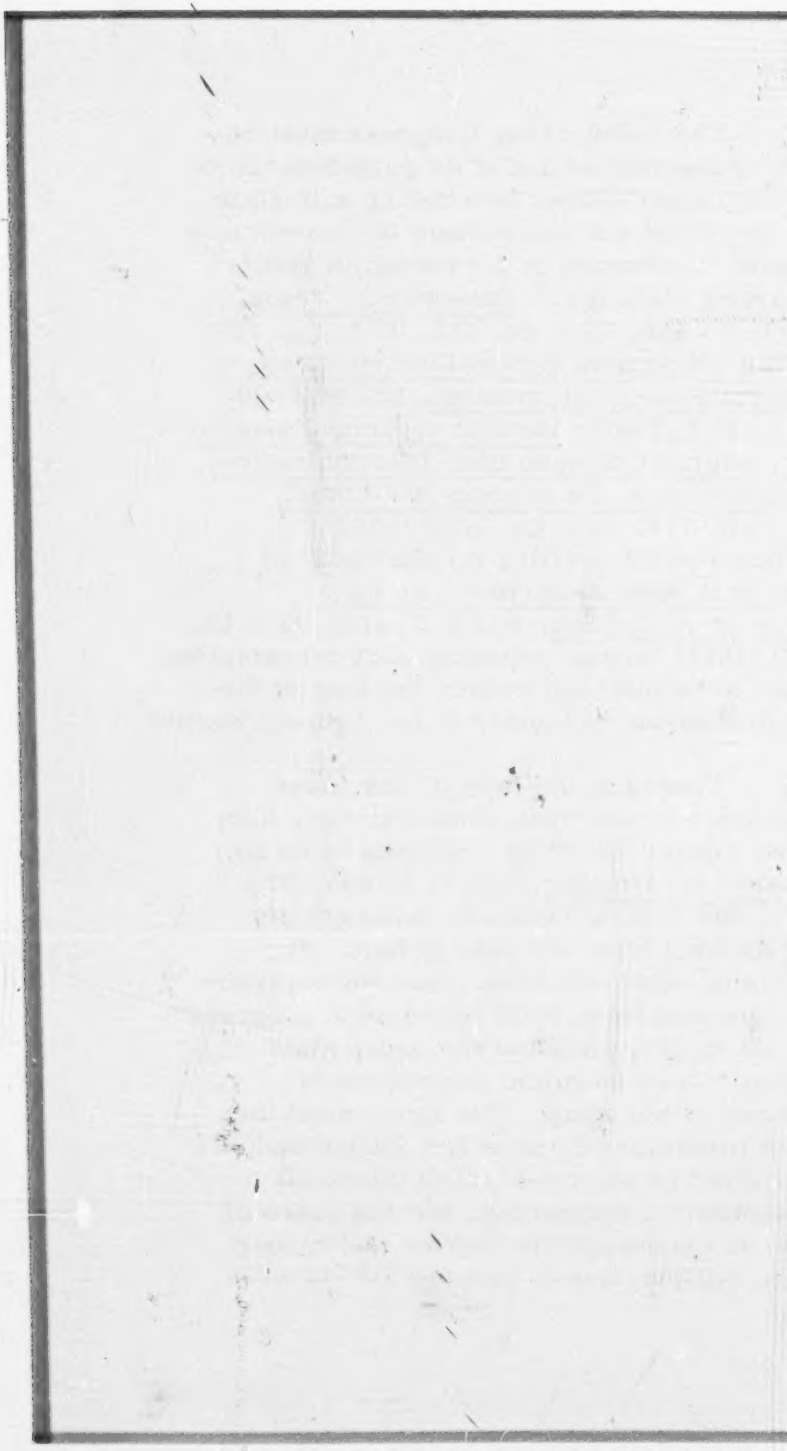
A comparison used in Florida Avocado Growers is particularly instructional here. At issue was a California Agricultural Code provision prohibiting certain types of avocadoes to enter the state. Federal marketing orders differed and under those orders the avocadoes restricted by the California provision would have been permitted. The Court found there was no "irreconcilable conflict" that would overcome the California law. It contrasted this conflict with one involving the Tobacco Act noting the contrary result when the statutory provisions are specific.

As a basis for determining whether Congress intended to pre-empt the field or supersede state law the Court will not seek out the mental frame of mind of the legislators but will let the statute speak for itself. Kendall v. Keith Furnace Co., 162 F.2d 1002 (8th Cir., 1947).



The intent of the Congress must be clearly manifested and if its purposes can be accomplished without interfering with state law the Court will not impose the supremacy clause. Inference is not enough to justify thwarting state law. Schwartz v. Texas, 344 U.S. 199, 73 S.Ct. 232, 97 L.Ed. 231 (1952); First Iowa Hydro-Electric Coop. v. Federal Power Commission, 151 F.2d 20 (C.A. D.C.1945); Kendall v. Keith Furnace Co., supra; Colorado Anti-Discrimination Commission v. Continental Air Lines, 372 U.S. 714, 83 S.Ct. 1022 (1963). Justice Powell writing for the Court in New York State Department of Social Services v. Dublino, 415 U.S. 405, 93 S.Ct. 2507 (1973) further explained that pre-emption is not to be inferred merely because of the comprehensive character of the Federal Statute.

Viewed in the light of this clear reluctance to override state law other than under explicit intent by Congress to do so, Wissner v. Wissner, 338 U.S. 655, 70 S.Ct. 398 (1949), becomes obviously distinguishable from the case at bar. By providing comprehensive plans for compensating servicemen upon retirement, Congress did not display an intent to usurp state property laws as to the disposition or interest in such pay. The intent read into these provisions by appellant cannot and should not be inferred. The intent to compensate a serviceman for his years of duty, to encourage his morale and career in the military and to provide for his well-



being in later life are in no way inconsistent with community property law or does division upon dissolution frustrate the purpose of these intents.

III

THE SURVIVOR BENEFIT PLAN, TO WHICH PETITIONER HAD THE OPTION OF SUBSCRIBING, IS NOT INCONSISTENT WITH CALIFORNIA'S TREATMENT OF MILITARY RETIREMENT PAY AS COMMUNITY PROPERTY.

Petitioner argues that Title 10 Sections 1447 through 1455 and 10 U.S.C.A. Section 2771 evidence a congressional intent to preclude the states from dividing military retirement pay at the time of a dissolution of marriage.

The Survivor Benefit Plan basically allows a retired member of the armed forces to accept a reduced rate of retirement pay in exchange for a subscription to an annuity plan which provides for his beneficiaries upon his death. It must be noted however, that the California Supreme Court in its decision in the instant case specifically precluded the ex-spouse from sharing in petitioner's military retirement pay upon petitioner's death. Consequently, it cannot be said that the ex-spouse is treated better than the serviceman's widow who is entitled to an annuity under the Survivor Benefit

Plan. While it is true the latter's rights terminate upon remarriage, California would not grant the divorced wife any rights in said fund once the serviceman died.

Petitioner further argues that Title 10 U.S.C.A. Section 2771 in its provision for the settlement of accounts of deceased members of the armed service evidences a congressional intent that all military compensation is the separate property of the serviceman husband. To the contrary, said statute merely allows the serviceman to designate a beneficiary to receive any residual monies which are due but unpaid at his death. Unlike the situation facing the court in Wissner where the right to choose a beneficiary was an integral and explicit part of the federal plan, here the serviceman's designation right constitutes no more than a contingency procedure to distribute whatever money, if any, is due to the serviceman for which he failed to collect. No congressional intent that the designation right is essential to the entire military retirement pay system, or that it forecloses the states from classifying the retirement benefits as community property exists.

IV

THE CASE OF WISSNER V. WISSNER RELIED UPON BY PETITIONER IS DISTINGUISHABLE FROM THE INSTANT CASE AND PRESENTS NO AUTHORITY FOR THE PROPOSITION THAT CONGRESS INTENDED MILITARY RETIREMENT PAY TO BE THE SEPARATE PROPERTY OF THE SERVICEMAN.

Scrutinized under the many Supreme Court pronouncements of the applicability of the supremacy clause it becomes readily apparent how the Court arrived at its decision in Wissner v. Wissner, 338 U.S. 655, 70 S. Ct. 398 (1949). Congress had specifically provided under the National Service Life Insurance Act for the ability of the serviceman to designate a beneficiary and such designation could be of a person other than his wife -- a designation in direct conflict with the California laws on community property. In such a case it is clear that there is a conflict, that the supremacy clause is set in operation, and that the state law is superceded. The Court did not ruminate over possible Congressional intent. It addressed itself to the actual provisions of the statute and found that "Congress has spoken with force and clarity: and that to hold otherwise would frustrate the 'deliberate purpose of Congress.'" (At pp. 658, 659.)

Petitioner however has tortured from Wissner a vacuous test for establishing when military payments or benefits may be determined to be separate property. Nowhere in the decision does the court discuss separate property. It makes no determination whether the proceeds of the insurance policy are the serviceman's separate property. It only determines that Congress had legitimately acted within its Constitutional authority and to the extent community property law was thwarted, the Congressional enactment was overriding. The Court did not nor did it have to decide whether the policy was separate property and certainly set up no test which could be applied to determine whether other military payments could be so characterized.

In addition, all of the characteristics or components of this test may also be attributed to active duty military pay. Certainly active duty pay is paid from Congressional appropriations, is non-contributory and the costs of its administration is borne by the United States. It is paid and frequently increased to raise the level of morale of the serviceman and to provide him material protection. Yet it is well-recognized that such pay to the extent earned during marriage in a community property jurisdiction is community property. Savings, investments or property attributed to it during the course of marriage would be subject to disposition on termination of the marriage.

Unlike the provisions of the National Service Life Insurance Act, the sections of Title 10 pertaining to military retirement pay are not explicit in creating a right or interest that conflicts with a wife's community property interest. They are like any other retirement system explicit only in the method of computation and terms of entitlement. They are compatible with the property laws of the various states.

Where both military retirement pay statutes and California's community property law can exist in harmony, California is free to act and the supremacy clause does not come into play.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue for review of the opinion of the California Supreme Court.

Respectfully submitted,

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